Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

NADEEM HASSAN,
Petitioner,

v.

MICHAEL CHERTOFF, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 19, 2010

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QUESTION PRESENTED

As a matter of federal law, where an alien departs from and returns to the United States with advance authorization to travel to the United States without a visa, can the government avoid its obligation to detain the alien for a hearing before an Immigration Judge by revoking the authorization so the alien could be removed, without a hearing, as an alien traveling to the United States without a visa?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner: Nadeem Hassan

Defendants-Appellees and Respondents: Michael Chertoff, personally and his successor in office, Janet Napolitano, in her official capacity as Secretary of United States Department of Homeland Security; and Al Galmann, personally and his successor, John Ramirez, in his official capacity as Field Office Director.

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The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 543 F.3d 564 (9th Cir. 2008), see also App. 1a. The order of the Federal District Court for the District of Arizona denying Petitioner's Petition for Writ of Mandamus is unpublished and appears at App. 11a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied review of this case on September 11, 2008 and denied rehearing of this case on January 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant Constitutional, statutory, and regulatory provisions involved in this case are the 5th Amendment to the United States Constitution, reproduced in Appendix C; 5 U.S.C. 702, 8 U.S.C. 1182(a)(7), 8 U.S.C. 1182(d)(5)(A), 8 U.S.C. 1225(b)(1)(A)(i), 8 U.S.C. 1225(b)(2)(A), 8 U.S.C. 1229a, 8 U.S.C. 1255(a), 28 U.S.C. 1331, 28 U.S.C. 1361, and 28 U.S.C. 1651 reproduced in Appendix D; and 8 C.F.R. 1.1(q), 8 C.F.R. 212.5(e), 8 C.F.R. 212.5(f), 8 C.F.R. 235.1(h)(2), 8 C.F.R. 245.2(a)(4)(ii)(B), 8 C.F.R. 245.2(a)(5)(ii), and 8 C.F.R. 1245.2(a)(1)(ii) reproduced in Appendix E.

STATEMENT OF THE CASE

"Oh what a tangled web we weave, When first we practice to deceive." Sir Walter Scott, Scottish Novelist, Poet, Historian and Biographer, 1771-1832

On January 9, 2002, Dr. Nadeem Hassan ("the petitioner"), a lawful temporary resident of the United States since the 1990s, filed Form I-485, Application to Register Permanent Residence or Adjust Status ("adjustment application") to adjust his status to that of a lawful permanent resident under 8 U.S.C. 1255(a). With this filing, the petitioner retained a right to renew his adjustment application before an immigration judge during 8 U.S.C. 1229a removal proceedings. 8 C.F.R. 245.2(a)(5)(ii). The petitioner established a vested interest in the adjustment application process, and he established vested interests in his liberty, property, and family ties in the United States including lawful permanent resident parents and brother.

Due to an unreasonable delay in the adjustment application process, the petitioner filed a Petition for Writ of Mandamus on October 21, 2004 in the Federal District Court in Phoenix, Arizona to compel agency action under 28 U.S.C. 1331 (Federal Question), 28 U.S.C. 1361 (Mandamus Act), 28 U.S.C. 1651 (All Writs Act), and 5 U.S.C. 702 (Administrative Procedures Act).

On or around December 8, 2005, upon satisfying the government that the petitioner's adjustment application was still pending and that he needed to travel abroad but he was without a visa to return to the United States, the United States Citizenship and

Immigration Services ("USCIS") granted the petitioner "advance parole." As required by regulation, the petitioner was then issued Form I-512[1], Authorization for Parole of an Alien Into the United States. See 8 C.F.R 212.5(f). The petitioner understood the purpose of the Form I-512 was to permit his return travel to the United States without a visa to pursue his adjustment application. On December 30, 2005, the petitioner departed the United States with the Form I-512 or advance parole travel document.

On January 13, 2006, while the petitioner was still abroad, the USCIS denied his adjustment application and, without notice and an opportunity to respond, immediately revoked his advance parole or Form I-512 travel document. The government did not put the petitioner's name on any "no fly" list or otherwise restrict his authorization to travel to the United States without a visa.

Six days later, on January 19, 2006, the petitioner traveled to the United States without a visa, as previously authorized by the government, using the Form I-512 or advance parole. All of the airlines the petitioner traveled on accepted the petitioner's Form I-512 as authorization to travel to the United States without a visa. Upon his arrival at New York City, however, the inspecting officer did not accept Form I-

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[1] Form I-512, in practice, is also known as "advance parole," and the terms are used interchangeably. Form I-512 is used as evidence of an alien's authorization to travel to the United States without a visa. Transportation companies and DHS Port-of-Entry officers rely on the form to determine whether or not the alien will be allowed to, for example, board an international flight or, for example, be paroled into the United States.

512 as authorization to travel to the United States without a visa. Instead, the officer indicated that, since the Form I-512 was revoked, the petitioner is deemed to have traveled to the United States without a visa. Accordingly, the officer determined the petitioner was inadmissible under 8 U.S.C. 1182(a)(7), treated him like a typical arriving alien under 8 U.S.C. 1225(b)(1)(A)(i), initiated removal proceedings, and ordered him removed immediately without further hearing. The sole and only reason for removal was that the petitioner was inadmissible as an alien who traveled to the United States without a visa.

The petitioner immediately amended his pending Petition for Writ of Mandamus and argued that the government acted in violation of law. The petition was denied. On appeal at the United States Court of Appeals for the Ninth Circuit ("9th Circuit"), the petitioner argued that the lower court erred in its interpretation of the law. The petitioner argued that the lower court had jurisdiction to review a government action that resulted in a deprivation of his United States Constitution, 5th Amendment, Due Process right to renew his denied adjustment application before an immigration judge under 8 U.S.C. 1229a. The 9th Circuit ruled against the petitioner finding that, since the purposes of the advance parole were served, the government action revoking the Form I-512 did not violate the statute or regulations.

REASON FOR GRANTING THE PETITION

There are two reasons relied on for allowing this request for Writ of Certiorari.

First, the 9th Circuit's misapprehension and misapplication of the statute and regulations results in a decision that allows the government to revoke its promise to permit an alien to travel to the United States without a visa in violation of the alien's Due Process rights. The government is constructively removing long time resident aliens from the United States without the required hearing before an Immigration Judge under 8 U.S.C. 1229a. This Court, therefore, must exercise its supervisory power to ensure no more miscarriages of justice occur in the future.

Second, the 9th Circuit's decision relates to an important question of federal law that has not been, but should be, settled by this Court, namely the distinction between aliens granted traditional "parole" into the United States and the unique and narrow cases of aliens granted "advance parole" permitting travel to the United States without a visa but who have not been paroled into the United States. In settling the question, this Court will prevent future harm to all similarly situated aliens who are currently abroad with Form I-512 and an expectation of returning to the United States without a visa to pursue their adjustment applications.

A. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS DECIDED A QUESTION OF FEDERAL LAW WITHOUT CONSIDERING THE AFFECT ITS ANSWER HAS ON PETITIONER'S RETAINED DUE PROCESS RIGHT TO 8 U.S.C. 1229a PROCEEDINGS AND, THEREFORE, THIS COURT MUST EXERCISE ITS SUPERVISORY POWER.

The 9th Circuit ruled that the government's revocation of the petitioner's Form I-512 was authorized by law. The court, however, did not consider relevant law that concerns the petitioner's Due Process rights in the adjustment application process and the court contradicts its own decision in *Freeman v. Gonzales*, 444 F.3d 1031, 1035 (9th Cir. 2006) with regard to the petitioner's rights.

I. An Alien's Rights in the Adjustment Application Process

Upon the filing of an adjustment application with the USCIS, by any alien in the United States, immigration regulations specify that the alien "retains the right to renew his or her [denied] application in proceedings under [8 U.S.C. 1229a]." 8 C.F.R. 245.2(a)(5)(ii). "With respect to these renewal and review procedures, there is no exception in the statute or regulations for aliens who are in the United States under any particular status; the procedures apply to any applicant for adjustment of status." *Freeman v. Gonzales*, 444 F.3d 1031, 1035 (9th Cir. 2006). "[A]lleged errors in DHS's adjudication...should be subject to review as part of the adjustment of status

process, and not foreclosed. *Freeman*, 444 F.3d at 1036.

In addition, any alien who departs the United States while the adjustment application is pending, can still retain the right to renew a denied application but only if certain conditions are met. See 8 C.F.R. 245.2(a)(5)(ii) and 8 C.F.R. 1245.2(a)(1)(ii). Under 8 C.F.R. 1245.2(a)(1)(ii), which applies to the petitioner, jurisdiction over an adjustment application lies solely with an Immigration Judge where the alien filed the adjustment application with USCIS while in the United States, the alien departed from and returned to the United States pursuant to the terms of a grant of advance parole to pursue the application, the application was denied by USCIS, and Department of Homeland Security ("DHS") placed the arriving alien in removal proceedings either upon the alien's return to the United States pursuant to the grant of advance parole or after USCIS denied the application. *Id.* The language in 8 C.F.R. 1245.2(a)(1)(ii) is clear.

II. An Alien's Rights in His or Her Vested Interests

In *Arevalo v. Ashcroft*, 344 F.3d 1, 14–15 (1st Cir. 2003), the court determined that an application for adjustment of status was a vested right even if the relief itself was discretionary. Citing *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the court stated that "an alien is not precluded from having a vested right in a form of relief merely because the relief itself is ultimately at the discretion of the Executive Branch." See also *INS v. St. Cyr*, 533 U.S. 289, 307–08 (2001) ["[t]raditionally, courts recognized a distinction between eligibility for discretionary relief, on the one

hand, and the favorable exercise of discretion, on the other hand. Eligibility that was 'governed by specific statutory standards' provided 'a right to a ruling on an applicant's eligibility,' even though the actual granting of relief was 'not a matter of right under any circumstances, but rather is in all cases a matter of grace'"]; *Succar v. Ashcroft*, 394 F.3d 8, 10 (1st Cir. 2005) [striking down regulation as *ultra vires* but holding, "[t]he mere fact that a statute gives the Attorney General discretion as to whether to grant relief after application does not by itself give the Attorney General the discretion to define eligibility for such relief"]; *U.S. v. Copeland*, 376 F.3d 61, 72 (2nd Cir. 2004) ["[t]he decisions holding that a failure to inform an alien about Section 212(c) relief cannot be a fundamental error ... incorrectly assume that, because the grant of Section 212(c) relief is itself discretionary, the denial of a Section 212(c) hearing cannot be a fundamental procedural error"].[2]

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[2] But see *Hamdan v. Gonzales*, 425 F.3d 1051, 1060–61 (7th Cir. 2005) [rejecting due process argument regarding IJ's conduct in reviewing adjustment application because adjustment is discretionary]; *Ali v. Ashcroft*, 395 F.3d 722, 732 (7th Cir. 2005) [no due process violation in applying *Pickering* to use vacated conviction for removal and to bar cancellation because there is no liberty or property interest in discretionary relief]; *Obleshchenko v. Ashcroft*, 392 F.3d 970, 971–72 (8th Cir. 2004) [no due process right regarding ineffective assistance of counsel in asylum claim because there is no liberty or property interest in discretionary relief]; *U.S. v. Torres*, 383 F.3d 92, 104–06 (3rd Cir. 2004) [removal proceeding was not fundamentally unfair where IJ did not inform respondent of the right to seek §212(c) relief because grant of relief was speculative and a matter of "grace:]; *Assaad v. Ashcroft*, 378 F.3d 471, 475–76 (5th Cir. 2004) [no due process violation and therefore no circuit court jurisdiction where counsel's ineffective

III. Applicability of These Rights to the Petitioner's Adjustment Application Proceedings

By regulation, the petitioner, before departing the United States, had a retained right to renew his adjustment application before an immigration judge during 8 U.S.C. 1229a removal proceedings. 8 C.F.R 245.2(a)(5)(ii). By law, he had a vested interest in that process before he departed the United States.

In addition, by obtaining a grant of advance parole before departing the United States, the petitioner retained his rights in the adjustment application process when he departed from and returned to the United States. 8 C.F.R. 1245.2(a)(1)(ii). The petitioner met all of the conditions in 8 C.F.R. 1245.2(a)(1)(ii) and, therefore, he had a right to be heard by an Immigration Judge upon his return to the United States without a visa and with Form I-512, revoked or not.

The 9th Circuit did not, however, reach a determination as to whether or not the government action revoking Form I-512 was lawful where the revocation violated the petitioner's Due Process right to a hearing before an Immigration Judge. Because the 9th Circuit did not engage in a full analysis of the law in this case and contradicts its own precedent in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), to the prejudice of the petitioner, this Court must exercise its supervisory powers and direct the 9th

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assistance involved the failure to receive a discretionary waiver of conditional residency].

Circuit to reconsider its decision in light of the petitioner's clear Due Process right to be heard by an Immigration Judge upon his return to the United States.

B. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING PAROLE OF ALIENS THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT TO PREVENT FUTURE HARM TO OTHER SIMILARLY SITUATED ALIENS WHO HAVE BEEN LEFT STRANDED ABROAD BY THE GOVERNMENT.

The 9th Circuit ruled that the government's revocation was lawful because the revocation was authorized by regulations. This conclusion is wrong because the statute and regulations apply only to aliens paroled "into" the United States and not those aliens intending to apply for parole into the United States upon their return to the United States with advance parole or Form I-512.

I. Parole Statute and Government Practice of Advance Parole Explained

"Parole" is an administrative process whereby the government allows an arriving alien, who has come to a port-of-entry without, for example, a visa required by 8 U.S.C. 1182(a)(7), to be temporarily released from detention and to remain inside the United States pending review of his or her immigration status. The statute governing parole is found at 8 U.S.C. 1182(d)(5)(A). After the purposes of "such parole" of

the alien into the United States have been served, however, the alien is to be returned to the custody of DHS and treated as an arriving alien. See 8 U.S.C. 1182(d)(5)(A).

"Advance parole" is not specified by statute or regulation, and it certainly is not "parole." It is, rather, a concept derived from 8 U.S.C. 1182(d)(5)(A) whereby the government grants an alien, in advance of the alien's departure from the United States, authorization to travel back to the United States, without a visa, to request parole into the United States from an inspecting officer. 8 C.F.R 212.5(f). If the government grants the parole, the alien is released from custody and permitted to physically enter the United States. Aliens with Form I-512 or advance parole can still pursue their previously filed adjustment applications upon their "inspection and parole" into the United States (8 C.F.R. 245.2(a)(4)(ii)(B)) or upon their "return" pursuant to the terms of a grant of advance parole (8 C.F.R. 1245.2(a)(1)(ii)).

II. Application of the Regulatory Authority for Parole

Under the parole regulations, the USCIS may grant advance authorization for parole into the United States specifically to an alien it knows will be traveling to the United States without a visa. 8 C.F.R. 212.5(f). An alien makes application for advance parole while in the United States using Form I-131, Application for Travel Document. But, by granting the Form I-131, in this specific and narrow situation, the government obligates itself to then issue the alien a travel document known as "advance parole" or, by regulation,

known as Form I-512. *Id.* What the form is known as or called by does not change what the regulation says about it, namely that Form I-512 is required to be issued if "parole is authorized for an alien who will travel to the United States without a visa..." *Id.* Implicit in the issuance of the Form I-512 is the authorization for an alien to return to the United States without a required visa under 8 U.S.C. 1182(a)(7) regardless of whether the alien is paroled into the United States or kept in DHS detention. *Id.* There is no other plausible interpretation of this regulation.

When the alien returns from abroad and presents Form I-512 to an inspecting officer, the Form I-512 will serve as evidence that the alien was authorized by the government to travel to the United States without a visa. 8 C.F.R. 212.5(f). In other words, since any issues of inadmissibility to the United States under 8 U.S.C. 1182(a)(7) were resolved by the government, prior to the alien's departure from the United States, the inspecting officer cannot charge the alien as removable for lack of a visa. 8 C.F.R. 1.1(q). But, the inspecting officer has the authority now to parole the "arriving alien," as that term is defined by 8 C.F.R. 1.1(q), into the United States.

If the officer paroles the alien into the United States, the alien must be issued Form I-94, Arrival/Departure Record, ("I-94") endorsed with a parole stamp. 8 C.F.R. 235.1(h)(2). That document, which evidences the alien's parole into the United States, becomes subject to termination upon certain conditions being met. See 8 U.S.C. 1182(d)(5)(A) and 8 C.F.R. 212.5(e).

III. Statutory Interpretation and the Doctrine of Constitutional Avoidance

A court faced with the task of interpreting a statute must first look to the language of the statute itself for evidence of its meaning. *Estate of Cowart v. Nicholas Drilling Co.*, 205 U.S. 469, 474 (1992); *Robinson v. Shell Oil*, 519 U.S. 337, 340 (1997). If the statutory language is clear and unambiguous, the Court must cease its analysis and give effect to the "plain meaning" of the words. *Robinson*, 519 U.S. at 340; *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").

The principle of interpreting statutes to avoid serious constitutional questions is triggered in the petitioner's case. *Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided"). *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) ("...if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is "fairly possible,"...we are obligated to construe the statute to avoid such problems.") (citations omitted). See also *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (interpreting post-removal order as including implicit limitations to avoid grave constitutional doubt).

If this Court accepts the petitioner's interpretation of 8 U.S.C. 1182(d)(5)(A), it is unnecessary for the

Court to reach the Due Process claim raised by the petitioner. If the Court questions the constitutionality of the revocation of the petitioner's required Form I-512, as it pertains to a deprivation of his right to a hearing before an Immigration Judge, the Doctrine of Constitutional Avoidance requires the Court to adopt the petitioner's alternate plausible statutory interpretation. *Clark v. Martinez*, 543 U.S. 371, 380 (2005). This Court must interpret a statute to avoid doubt as to its constitutionality, and that interpretation must be applied to the statute even in circumstances where another interpretation might be constitutionally permissible. *Id.* at 380 ("the constitutional concerns that influenced our statutory construction in Zadvydas are not present for aliens, such as Martinez and Benitez").

IV. Applicability to the Petitioner

The problem that occurred, in the typically smooth parole process described above, is that the government revoked the petitioner's Form I-512, which permitted his travel to the United States without a visa, and then claimed that the petitioner was removable as an alien who traveled to the United States without a visa. The petitioner argues that the government's revocation of his Form I-512 was unlawful because the Form I-512 serves to preserve his rights upon his return to the United States and because the petitioner was never paroled "into" the United States in the first place.

A. Form I-512, Once Issued, Cannot be Revoked After an Alien Departs the United States Because It Serves to Preserve Rights an Alien Did Not Intend to Abandon.

A review of the government's action supports the petitioner's position that the revocation was unlawful. For example, the government argued it has the same discretionary authority to revoke advance parole under 8 U.S.C. 1182(d)(5)(A) as it did in granting the advance parole in the first place. The statute states that the government may "parole *into* the United States...any alien applying for admission to the United States." (emphasis supplied) 8 U.S.C. 1182(d)(5)(A). The statute further states that when the purposes of "such parole" have been served the alien will be returned to the custody of DHS and "dealt with in the same manner as that of any other applicant for admission to the United States." *Id.*

Petitioner argues that "such parole" refers to the "parole" of the alien "into" the United States. Based on a plain reading of the statute, the alien must first be paroled "into" the United States as a condition precedent to a determination that the purposes of "such parole" have been served. *Id.* Also, based on a plain reading of the regulation relied on by the government, the parole must exist before "accomplishment of the purpose for which parole was authorized" can be determined. 8 C.F.R. 212.5(e). Therefore, an alien with a grant of "advance parole," is not paroled "into" the United States. If he or she was, then Form I-94 would have been issued. 8 C.F.R. 235.1(h)(2). None was issued in the petitioner's case; he was only issued Form I-512 authorizing his travel

to the United States without a visa to apply for parole into the United States to be issued Form I-94. Moreover, there is no language in the regulation or statute specifying advance parole or Form I-512 can be revoked after it is issued to an alien who departs the United States in reliance thereon. Therefore, if the petitioner was not paroled "into" the United States, then the revocation of Form I-512 was unlawful.

If the government action is to be considered lawful notwithstanding, then the petitioner should have been returned to the custody from which he was paroled, namely returned to Phoenix, Arizona and treated as an arriving alien. 8 U.S.C. 1225(b)(2)(A). This, assuming there is evidence required Form I-94 was issued to the petitioner in Phoenix, Arizona in the first place.

In sum, the petitioner was issued a travel document known as advance parole or Form I-512 to accomplish two things: (1) authorize his travel to the United States without a visa and (2) authorize his parole into the United States notwithstanding the lack of a required visa. If no parole ever existed in the petitioner's case, then it follows that no determination could be made that the purposes of "such parole" have been served. 8 U.S.C. 1182(d)(5)(A). And if such determination could not be made, then revocation of Form I-512 has to be unlawful and, thus, the petitioner was unlawfully deprived his right to a hearing before an Immigration Judge under 8 U.S.C. 1225(b)(2)(A). Absent any law authorizing otherwise, advance parole or Form I-512, once issued, cannot be revoked after the alien departs the United States.

B. Because the Petitioner Returned to the United States Pursuant to Form I-512, He Must Have an 8 U.S.C. 1229a Hearing

The question that lies unanswered in the petitioner's narrow and unique situation is: what authority exists that addresses aliens who, although they were granted advance parole and issued Form I-512, they did not quite travel fast enough to return to the United States before their adjustment applications were denied?

In answering this question, the petitioner relies on 8 C.F.R. 1245.2(a)(1)(ii). The regulation states that an Immigration Judge has jurisdiction over an arriving alien's denied adjustment application if the alien meets the following conditions:

(A) The alien properly filed the application for adjustment of status with USCIS while the arriving alien was in the United States;

(B) The alien departed from and returned to the United States pursuant to the terms of a grant of advance parole [or Form I-512] to pursue the previously filed application for adjustment of status;

(C) The application for adjustment of status was denied by USCIS; and

(D) DHS placed the arriving alien in removal proceedings either upon the arriving alien's return to the United States pursuant to the grant of advance parole or after USCIS denied the application.

The significance of 8 C.F.R. 1245.2(a)(1)(ii) is that, unlike 8 C.F.R 245.2(a)(4)(ii)(B), the petitioner does not need to have been "inspected and paroled" into the United States upon his return. But, he needs the Form I-512 to return to the United States. The regulation, unlike 8 C.F.R. 245.2(a)(4)(ii)(B), also does not require the adjustment application to be denied "subsequent" to the petitioner's parole into the United States. But, he needs the Form I-512 to return to the United States. The regulation, unlike 8 C.F.R. 245.2(a)(4)(ii)(B), simply requires that the petitioner return to the United States pursuant to the terms of his advance parole or Form I-512 to pursue his application. And the petitioner did. In fact, if the government did not issue the required Form I-512, the petitioner would never have departed the United States. 8 C.F.R. 1245.2(a)(1)(ii) also does not specify what statutory form of removal proceedings the petitioner must be placed into. It can be any.

The government, however, tried to strip the petitioner of his right to renew his application before an Immigration Judge by revoking the travel document it was required to give him before he departed. That document permitted the petitioner to return to the United States without a visa. Unfortunately for the government, it was unable to get the message to the airlines who, like the petitioner, relied on the Form I-512 to allow the petitioner to travel to the United States without a visa. This is not the first time that the government has done this to an alien and it continues today.

Having met all of the conditions of 8 C.F.R. 1245.2(a)(1)(ii), the petitioner preserved his right to be heard by an Immigration Judge upon returning to the

United States, whether he was paroled into the United States or not and regardless of his Form I-512 being allegedly revoked. DHS was, therefore, obligated to detain the petitioner for a hearing before an Immigration Judge under 8 U.S.C. 1229a. 8 U.S.C. 1225(b)(2)(A). It did not and the petitioner has been greatly prejudiced.

CONCLUSION

The 9th Circuit decision is wrong and the petitioner has been prejudiced. The 9th Circuit decision "effectively [denied the petitioner] the procedural due process all other applicants enjoy." *Freeman*, 444 F.3d 1031, 1036 (9th Cir. 2006). The Doctrine of Constitutional Avoidance calls for this Court to adopt the petitioner's plausible interpretation of 8 U.S.C. 1182(d)(5)(A), assuming the Court finds the statute ambiguous.

Since this case is of significant public importance affecting possibly thousands of aliens who will be stranded abroad with the very document that authorized their return to the United States, a correction must be made in the decision made by the 9th Circuit. For the foregoing reasons, the Judgment and decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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Dated: April 19, 2010

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-17252
D.C. No. CV-04-02251-PHX-FJM

[Filed January 19, 2010]

NADEEM HASSAN, *Plaintiff-Appellant,*	)
v.	)
MICHAEL CHERTOFF, Secretary of Department of Homeland Security; AL GALLMANN, Acting District Director, Phoenix District Office, Citizenship and Immigration Service, *Defendants-Appellees.*	)

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Frederick J. Martone, District Judge, Presiding

Argued and Submitted
June 13, 2008—San Francisco, California

Filed September 11, 2008
Amended January 19, 2010

Before: Mary M. Schroeder, John M. Walker, Jr.,* and Randy Smith, Circuit Judges.

Per Curiam Opinion

COUNSEL

Eric G. Bjotvedt, Esq., Phoenix, Arizona, for plaintiff/appellant, Nadeem Hassan.

Thomas H. Dupree, Jr., Esq. USDOJ, Washington, D.C., for defendants/appellees, Michael Chertoff, Secretary of Homeland Security et al.

ORDER

The Opinion filed September 11, 2008, slip op. 12719, and appearing at 543 F.3d 564 (9th Cir 2008), is amended as follows:

1. At slip op. 12723, following the "Analysis" heading, substitute the first two paragraphs with:

"Hassan argues that the government inappropriately denied his application for adjustment of status. The government, however, denied Hassan's application as a matter of discretion. The government concluded that Hassan posed a threat to national security. As the district court correctly noted, judicial

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* The Honorable John M. Walker, Jr., Senior U.S. Circuit Judge for the Second Circuit, sitting by designation.

review of the denial of an adjustment of status application — a decision governed by 8 U.S.C. § 1255 — is expressly precluded by 8 U.S.C. § 1252(a)(2)(B)(i). Moreover, judicial review of a discretionary determination is also expressly precluded by 8 U.S.C. § 1252(a)(2)(B)(ii). The denial of Hassan's adjustment of status application on the basis that he poses a threat to national security is a determination committed to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. § 1252(a)(2)(B)(ii); *cf. Hosseini v. Gonzales*, 464 F.3d 1018, 1021 (9th Cir. 2006) ("We lack jurisdiction to review the BIA's denial of Hosseini's adjustment of status claim because the BIA alternatively denied relief as a matter of discretion."). Therefore, this court lacks the authority to review Hassan's claim under 8 U.S.C. § 1252(a)(2)(B)(ii).

However, "[w]e retain jurisdiction to review constitutional claims, even when those claims address a discretionary decision." *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1004 (9th Cir. 2003). Hassan asserts that his due process rights were violated because the government failed to follow its own regulations during the decision-making process. Specifically, Hassan contends that the government deprived him of the opportunity to rebut evidence against him in violation of its regulations. *See* 8 C.F.R. § 103.2(b)(16)(i). This regulation provides that, if a decision

> will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and

present information in his/her own behalf before the decision is rendered.

Id.

Hassan's argument fails. Hassan was aware of the information against him. He was questioned about his involvement in the terrorist organization. He was given the opportunity to explain his association during the course of that questioning. The regulation that Hassan cites requires no more of the government. Accordingly, Hassan has failed to raise a colorable constitutional argument, and a litigant must raise a colorable constitutional violation before this court has jurisdiction to review his otherwise unreviewable claim. *See, e.g., Sanchez-Cruz v. INS*, 255 F.3d 775, 779 (9th Cir. 2001)."

2. At slip op. 12725, substitute the final paragraph of the opinion with: "For the foregoing reasons, we affirm the district court's dismissal of this case."

With these amendments, the panel has voted to deny the petition for panel rehearing and the petition for rehearing en banc, and Judge Walker so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

Absent further order of the court, no further petitions for rehearing or rehearing en banc will be considered.

OPINION

PER CURIAM:

Nadeem Hassan, a citizen of Pakistan, appeals the district court's dismissal of his complaint seeking mandamus relief and challenging the government's denial of his application for adjustment of status and cancellation of his permission to return to this country. We lack jurisdiction to review the government's actions and affirm the district court's dismissal. *See* 8 U.S.C. § 1252(a)(2)(B)(i)-(ii).

Background

In January 2002, while physically present in the United States, Hassan applied for adjustment of status to lawful permanent resident pursuant to section 245 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1255(a). In October 2004, the government had not yet acted on his application, so he filed this mandamus action in the United States District Court to compel the government to act on the application. In 2005, the government questioned him about possible ties to a group the government suspected of having links to terrorists.

While his adjustment application was still pending, Hassan traveled outside the United States to Saudi Arabia. He received a travel document from the government, Form I-512, commonly referred to as an "advance parole." It granted him permission to return

to the United States, so long as his application for adjustment remained pending. While Hassan was abroad, the government denied his adjustment application and revoked the advance parole. When he attempted to return to the United States, he was denied admission, placed in expedited removal proceedings, and removed. He then amended his complaint in this action to challenge the denial of status adjustment and revocation of advance parole.

The district court held that under the REAL ID Act of 2005, 8 U.S.C. § 1252(a)(2)(B), both the denial of the adjustment of status and the revocation of the advance parole were discretionary decisions that the court lacked jurisdiction to review. The statute the court relied upon with respect to adjustment of status provides that "no court shall have jurisdiction to review any judgment regarding the granting of relief under section . . . 1255 of this title . . . ." 8 U.S.C. § 1252(a)(2)(B)(i). The statute the district court relied on to determine that it lacked jurisdiction to review the revocation of advance parole is 8 U.S.C. § 1252(a)(2)(B)(ii), which provides that "no court shall have jurisdiction to review any other decision . . . of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security . . . ."

Analysis

[1] Hassan argues that the government inappropriately denied his application for adjustment of status. The government, however, denied Hassan's application as a matter of discretion. The government concluded that Hassan posed a threat to national

security. As the district court correctly noted, judicial review of the denial of an adjustment of status application — a decision governed by 8 U.S.C. § 1255 — is expressly precluded by 8 U.S.C. § 1252(a)(2)(B)(i). Moreover, judicial review of a discretionary determination is also expressly precluded by 8 U.S.C. § 1252(a)(2)(B)(ii). The denial of Hassan's adjustment of status application on the basis that he poses a threat to national security is a determination committed to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. § 1252(a)(2)(B)(ii); *cf. Hosseini v. Gonzales*, 464 F.3d 1018, 1021 (9th Cir. 2006) ("We lack jurisdiction to review the BIA's denial of Hosseini's adjustment of status claim because the BIA alternatively denied relief as a matter of discretion."). Therefore, this court lacks the authority to review Hassan's claim under 8 U.S.C. § 1252(a)(2)(B)(ii).

However, "[w]e retain jurisdiction to review constitutional claims, even when those claims address a discretionary decision." *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1004 (9th Cir. 2003). Hassan asserts that his due process rights were violated because the government failed to follow its own regulations during the decision-making process. Specifically, Hassan contends that the government deprived him of the opportunity to rebut evidence against him in violation of its regulations. *See* 8 C.F.R. § 103.2(b)(16)(i). This regulation provides that, if a decision

> will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an

> opportunity to rebut the information and present information in his/her own behalf before the decision is rendered.

Id.

[2] Hassan's argument fails. Hassan was aware of the information against him. He was questioned about his involvement in the terrorist organization. He was given the opportunity to explain his association during the course of that questioning. The regulation that Hassan cites requires no more of the government. Accordingly, Hassan has failed to raise a colorable constitutional argument, and a litigant must raise a colorable constitutional violation before this court has jurisdiction to review his otherwise unreviewable claim. *See, e.g., Sanchez-Cruz v. INS*, 255 F.3d 775, 779 (9th Cir. 2001).

The only remaining question pertains to the revocation of Hassan's advance parole. The district court ruled that it lacked jurisdiction to consider the issue because the revocation of advance parole, like the grant of advance parole, is discretionary. *See* 8 U.S.C. § 1182(d)(5)(A) (stating that the Attorney General may "in his discretion parole into the United States . . . any alien"); *see also Samirah v. O'Connell*, 335 F.3d 545, 548 (7th Cir. 2003) ("The Attorney General . . . has the discretion to revoke advance parole after it has been granted.").

[3] On appeal, Hassan argues that the district court had jurisdiction to review the revocation. He claims that the government lacked any discretion to revoke his advance parole because no statute or regulation expressly authorizes revocation. We

disagree. The statutory and regulatory provisions governing the grant of parole provide for the revocation of parole when it no longer serves its purpose. *See* 8 U.S.C. § 1182(d)(5)(A) ("[W]hen the purpose of such parole shall, in the opinion, of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."); 8 C.F.R. § 212.5(e)(2)(i) (providing that DHS "shall" terminate parole "upon accomplishment of the purpose for which parole was authorized or when in the opinion of [certain enumerated DHS officials], neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the United States"); *see also Samirah*, 335 F.3d at 548 (interpreting these provisions as granting DHS authority to revoke advance parole).

[4] DHS complied with these regulations when it revoked Hassan's advance parole. It is undisputed that Hassan was granted advance parole solely to allow him to return to this country while his application for status adjustment was pending. Thus, once Hassan's application for adjustment of status was denied, he was no longer eligible for advance parole. *See* U.S. Citizenship & Immigration Servs., Dep't of Homeland Sec., *Adjudicator's Field Manual* § 54.3 (2008) (providing that an applicant for adjustment of status is eligible for advance parole only if his application has not yet been decided). The revocation inevitably followed from DHS's discretionary decision to deny the adjustment of status. Under these circumstances, DHS was required by its own

regulation to terminate the advance parole, the parole having served its purpose. *See* 8 C.F.R. § 212.5(e)(2)(i).

The district court properly rejected Hassan's argument that it had jurisdiction to review the revocation of advance parole as an ultra vires. The revocation was lawfully authorized.

For the foregoing reasons, we affirm the district court's dismissal of this case.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CV-04-2251-PHX-FJM

[Filed October 31, 2006]

Nadeem Hassan,	)
	)
Plaintiff,	)
	)
vs.	)
	)
Michael Chertoff, Secretary of Department of Homeland Security, et al.,	)
	)
Defendants.	)

ORDER

The court has before it defendants' motion to dismiss (doc. 27), plaintiff's[1] response (doc. 29), defendants' reply and motion for leave to file a late reply (doc. 30), and plaintiff's objection to the motion

[1] Notwithstanding that Nadeem Hassan's wife, Amber Hassan, was added as a plaintiff in the amended complaint, we refer only to Nadeem Hassan for ease of discussion. However, this order applies to both plaintiffs.

for leave to file a late reply (doc. 31).[2] The motion to file the late reply is hereby granted (doc. 30).

I

Plaintiff, a native and citizen of Pakistan, lived with his family in Phoenix, Arizona for a number of years. On January 9, 2002, he filed a Form I-485 (Application to Register Permanent Residence or Adjust Status). The government interviewed him on July 25, 2005 and December 8, 2005, in connection with his adjustment of status application. On December 8, 2005, while his application was still pending, plaintiff applied for and received travel documents, including approval for advance parole (Form I-512), in anticipation of a trip outside the United States. On December 30, 2005, plaintiff traveled to Saudi Arabia. On January 13, 2006, while plaintiff was outside the United States, the Citizenship and Immigration Services (CIS) denied plaintiff's status adjustment application and revoked his advance parole authorization. Plaintiff returned to the United States on January 19, 2006, applied for admission at JFK International Airport, and was detained by Department of Homeland Security officials. Because his advance parole had been revoked, plaintiff was removed from the United States via expedited removal procedures as an "arriving alien" not in possession of valid entry documents. 8 U.S.C. § 1225(b)(1). Plaintiff did not move to have that order

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[2] Plaintiff's objection to defendants' motion for leave to file a late reply is not a proper objection, but instead is a sur-reply not permitted by the rules. Nevertheless, we have considered all arguments asserted by the parties.

reopened and reconsidered and the opportunity to do so has now expired. 8 C.F.R. § 103.5. However, he has filed a Form I-212 application for waiver of inadmissibility, which remains pending.

Defendants' denial of adjustment of status and revocation of parole was based in part on the determination that plaintiff was ineligible for adjustment of status because of his association with an organization known as Jamaat al Tabligh ("JT"), a group identified as a terrorist organization under 8 U.S.C. § 1182(a)(3)(B)(vi)(III), in that it allegedly provides material support to al Qaida and the Taliban. Accordingly, the CIS district director concluded that plaintiff was inadmissible and ineligible for adjustment of status pursuant to 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (engaging in terrorist activity by providing material support to a terrorist organization), and 8 U.S.C. § 1182(a)(3)(B)(iv)(V) (soliciting individuals for membership into a terrorist organization). As an independent basis for denying plaintiff's application, the district director found that plaintiff failed to make full and truthful disclosures in completing his Form I-485 application when he failed to list his membership in four organizations, including the JT. See 8 U.S.C. § 1182(a)(6)(C)(i) (an alien who by fraud or willfully misrepresents a material fact while seeking to procure a visa is inadmissible).

In addition to these findings of inadmissibility, the district director also denied plaintiff's application as a matter of discretion. Noting that adjustment of status is an act of administrative grace–an extraordinary benefit that should be granted only in meritorious cases–the district director concluded that, because of

national security concerns, the favorable exercise of discretion was not warranted in this case.

Plaintiff now challenges the denial of his adjustment of status application, arguing that CIS improperly failed to follow its own regulations, which require that he have an opportunity to present rebuttal evidence before the decision was rendered. In addition, he argues that advance parole was improperly revoked, that he was entitled to parole upon return to the United States, and that he should be allowed to return to the United States and either resume his adjustment application or appeal the denial in a 240 removal proceeding.[3]

II

The central issue before us is whether we have jurisdiction to consider plaintiff's claims. Pursuant to 8 U.S.C. § 1255(a), Congress gave the Attorney General broad discretion to adjust the status of an eligible alien to that of a lawful permanent resident. Under § 1255(a), a status adjustment application must meet several prerequisites: (1) the alien must have been "inspected and admitted or paroled" into the United States; (2) he must have submitted an application for adjustment of status; (3) an immigrant visa must be "immediately available" to the alien at the time the adjustment application is filed; and (4) he must be "eligible to receive an immigrant visa and . . .

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[3] The regulations provide that "[n]o appeal lies from the denial of an adjustment application by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in [240 removal] proceedings." 8 C.F.R. § 245.2(a)(5)(ii)

admissible to the United States for permanent residence." 8 U.S.C. § 1255(a); see also 8 C.F.R. § 245.1(a), .2(a). In addition, an adjustment of status applicant must demonstrate that he merits status adjustment in the exercise of the Attorney General's discretion. 8 U.S.C. § 1255(a); see also Elkins v. Moreno, 435 U.S. 647, 667, 98 S. Ct. 1338, 1350 (1978) ("adjustment of status is a matter of grace, not right").

Plaintiff contends that this court has jurisdiction under either the Administrative Procedure Act, 5 U.S.C. § 704; the Mandamus Act, 28 U.S.C. § 1361; or 28 U.S.C. § 1331, pursuant to federal question jurisdiction. Defendants argue, in contrast, that our jurisdiction is limited by 8 U.S.C. § 1252(a)(2)(B), which specifically addresses the jurisdiction of federal courts to review decisions regarding adjustment of status under § 1255, or any other decision expressly stated to be within the Attorney General's discretion.

It is well established that a "general statute cannot confer jurisdiction when a more specific statute explicitly denies it." Vinieratos v. U.S. Dept. of Air Force, 939 F.2d 762, 774 (9th Cir. 1991). In May 2005, Congress enacted the REAL ID Act, which provides that the jurisdictional strictures of § 1252(a)(2)(B) apply, "[n]otwithstanding any other provision of law (statutory or nonstatutory), including . . . sections 1361 [Mandamus Act] and 1651 [All Writs Act] of [Title 28], . . . and regardless of whether the judgment, decision, or action is made in removal proceedings." 8 U.S.C. § 1252(a)(2)(B). By virtue of this amendment, Congress made clear that this court has no jurisdiction under the APA, the Mandamus Act or "any other provision of law," to review a decision to grant or deny relief under certain expressly enumerated provisions set forth in 8

U.S.C. § 1252(a)(2)(B)(i), including the denial of an application for adjustment of status under 8 U.S.C. § 1255. Accordingly, our jurisdiction vel non is derived from § 1252(a)(2)(B).

In the present case, CIS denied the adjustment application based not only on inadmissibility considerations, but also as a matter of discretion. First, CIS determined that the plaintiff was inadmissible as an alien found to have engaged in terrorist activity, and for misrepresenting material facts in his application. Second, CIS denied plaintiff's application as a matter of discretion based on national security concerns. In either case, we do not have jurisdiction to hear plaintiff's claims. Section 1252(a)(2)(B) broadly states that "no court shall have jurisdiction to review any judgment regarding the granting of relief under section 1255 . . . [or] any other decision . . . specified . . . to be in the discretion of the Attorney General." It is incontrovertible that the denial of an application for adjustment of status is within the broad discretion of the Attorney General. Therefore, we are without jurisdiction to review the denial of adjustment.

Plaintiff contends, however, that the jurisdictional limitation of § 1252(a)(2)(B) does not apply because he is not appealing a discretionary decision denying his application, but instead is asserting that his constitutional due process rights were violated by the defendants' failure to follow their own regulations in the decision making process, when they deprived him of the opportunity to submit rebuttal evidence related to his adjustment application, as required by 8 C.F.R. §§ 103.2(b)(8) and 103.2(b)(16)(i). In his amended complaint, plaintiff asks us to issue a writ of

mandamus, under 28 U.S.C. § 1361, to compel the defendants to perform their nondiscretionary duty to allow him to present rebuttal evidence.

Here, the decision to deny plaintiff's application was based in large part on his involvement with the JT. CIS found that when plaintiff was questioned about the JT during two separate interviews, he offered conflicting testimony about the nature of, and his involvement in, the group. Plaintiff initially denied that the JT was even an organization, but ultimately admitted that not only was it an established organization, but that he held a position of responsibility in it. CIS concluded that plaintiff was ineligible for adjustment of status because he made misrepresentations of material facts in his application.

As an additional ground for finding plaintiff ineligible for adjustment of status, CIS relied upon a report by the FBI, which concluded that the JT is engaged in terrorist activities, and that plaintiff provided material support to this organization. Although plaintiff was specifically questioned about his involvement in the JT, and therefore had an opportunity to explain his association with the group, he complains that CIS failed to disclose the FBI report and provide him an opportunity to rebut its contents. Plaintiff argues that pursuant to 8 C.F.R. §§ 103.2(b)(8) and 103.2(b)(16)(i), CIS was required to disclose the FBI report and afford him an opportunity to rebut its contents.[4]

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[4] Although we do not reach the merits of plaintiff's claim, we note that 8 C.F.R. § 103.2(b)(8) does not serve to confer rights upon plaintiff. Section 103.2(b)(8) provides that when there is no

Regardless of how plaintiff characterizes his claim, this is essentially an appeal from the denial of his adjustment of status application. We recognize that courts have limited the scope of the § 1252(a)(2)(B) jurisdictional bar to discretionary decisions only, and not to purely legal, and hence non-discretionary questions. See, e.g., Montero-Martinez v. Ashcroft, 277 F.3d 1137, 1144 (9th Cir. 2002) (holding that court has jurisdiction to review nondiscretionary, statutory eligibility determinations). However, here, plaintiff contends that he was not afforded the appropriate procedures in the application process, and that this

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evidence of ineligibility and initial evidence is missing or raises questions regarding eligibility, CIS may request the missing initial evidence and allows, but does not require, CIS to request additional evidence. This provision does not apply here because (1) there is no allegation that initial evidence was missing, (2) the decision to request additional evidence is discretionary, and (3) in any event this provision does not require CIS to disclose any evidence, including the FBI report.

Similarly, it is questionable whether 8 C.F.R. § 103.2(b)(16)(i) imposed any obligation on defendants under the circumstances of this case. This regulation provides that when a decision "will be adverse to the applicant . . . and is based on derogatory information," the applicant "shall be advised of this fact and offered an opportunity to rebut the information and present information in his own behalf before the decision is rendered." 8 C.F.R. § 103.2(b)(16)(i). Over the course of two interviews, plaintiff was specifically questioned about his involvement in the JT, thereby providing plaintiff notice of defendants' interest in the group and an opportunity to explain his association with it. Moreover, plaintiff's involvement in the JT was only one of the stated reasons for denying his adjustment application. His failure to adequately and truthfully complete the application was an independent basis to deny the application, which would not implicate any disclosure obligation under § 103.2(b)(16)(i).

failure resulted in an improper denial of his application. This is not an issue of statutory or regulatory construction as in Montero-Martinez, but instead is a challenge to CIS' application of unambiguous regulations to the facts of a particular case. This is the kind of claim appropriately raised in an appeal of the underlying decision. As previously stated, Congress has divested this court of jurisdiction to consider such appeals. See 8 U.S.C. § 1252(a)(2)(B).

Even if we were persuaded that the question presented is purely legal, and thus non-discretionary, we are faced with the question of whether the issues in this case present a live case or controversy. A case loses its character as a present, live controversy and becomes moot when the court no longer can issue any effective relief. Cantrell v. City of Long Beach, 241 F.3d 674, 678 (9th Cir. 2001). Given the procedural posture of this case, our review of the procedures applied by CIS in its decision making process is incapable of providing any effective relief. To be eligible for an adjustment of status, an applicant must be "admissible." 8 U.S.C. § 1255(a). An alien who was "previously removed" is not "admissible." 8 U.S.C. § 1182(a)(9). Plaintiff's advance parole was revoked,[5] rendering him an "arriving alien" without valid entry documents upon his return, and consequently subject to expedited removal. Because plaintiff was removed,

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[5] We note that plaintiff left the United States while his adjustment application was pending against the advice of his lawyer. Amended Complaint ¶ 32. He was warned that if he left the country, it was possible that CIS would deny his application in their discretion, possibly resulting in his immediate removal. Id. Arguably, this decision constitutes a knowing waiver of his rights under 8 C.F.R. § 245.2(a).

he is ineligible for adjustment of status. Any decision by this court will have no effect on the removal order entered and executed in New York. Moreover, even if we had jurisdiction to review the removal order, review is restricted to habeas corpus proceedings, 8 U.S.C. § 1252(e), and the limited scope of review prohibits review of inadmissibility determinations. 8 U.S.C. § 1252(e)(5). The inevitable conclusion is that plaintiff remains removed, rendering him inadmissible, and consequently ineligible for adjustment of status. Therefore, our reconsideration of the adjustment denial is incapable of providing plaintiff with any effective relief, and accordingly the issue presented is moot. See Nyaga v. Ashcroft, 323 F.3d 906, 916 (11th Cir. 2003) ("Because we conclude that Nyaga is no longer eligible to receive a visa, the district court could not provide meaningful relief to the Plaintiffs and the court was compelled to dismiss this case as moot.").

Finally, even if we concluded that we had jurisdiction to consider plaintiff's constitutional challenge, we would nevertheless reach the same result because plaintiff had no constitutional right to the regulatory process. Relying on United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268, 74 S. Ct. 499, 504 (1954), plaintiff argues that the failure of an agency to follow its own regulations violates the Due Process Clause. However, "an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." Olim v. Wakinekona, 461 U.S. 238, 250 n.12, 103 S. Ct. 1741, 1748 n.12 (1983). "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." Id. at 250, 103 S. Ct. at 1748. It is well

established that the availability of discretionary benefits does not create a liberty interest. See, e.g., Tovar-Landin v. Ashcroft, 361 F.3d 1164, 1167 (9th Cir. 2004) ("aliens have no fundamental right to discretionary relief from removal for purposes of due process and equal protection"); Munoz v. Ashcroft, 339 F.3d 950, 954 (9th Cir. 2003) ("[s]ince discretionary relief is a privilege created by Congress, denial of such relief cannot violate a substantive interest protected by the Due Process clause"). Moreover, the application process for a discretionary benefit cannot itself constitute a protected liberty interest. Olim, 461 U.S. at 250, 103 S. Ct. at 1748 ("An expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause. . . . The Court of Appeals thus erred in attributing significance to the fact that the prison regulations require a particular kind of hearing before the administrator can exercise his unfettered discretion."); Nguyen v. Gonzales, 400 F.3d 255, 259 (5th Cir. 2005) (rejecting argument that aliens have a due process right to a discretionary relief hearing, because "neither relief from removal under discretionary waiver nor eligibility for such discretionary relief is entitled to due process protection") (emphasis omitted). Therefore, because the relief sought was entirely discretionary, the regulatory process related to the application for such discretionary relief affords no liberty interest.

III

Plaintiff argues that even if we leave undisturbed the denial of the adjustment application, he nevertheless is entitled to renew his application in a 240 removal proceeding because he was not an "arriving alien" upon his return to the United States.

8 C.F.R. § 245.2(a)(5)(ii) ("[n]o appeal lies from the denial of an application by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in [240 removal] proceedings"). Plaintiff contends that because he obtained advance parole prior to leaving the country, he should have been treated as a non-arriving alien upon his return and placed in a 240 proceeding where he could appeal the denial of his adjustment application.

We do not have jurisdiction to review the revocation of plaintiff's advance parole. The Attorney General has broad discretion to grant or revoke parole, 8 U.S.C. § 1182(d)(5)(A) ("[t]he Attorney General may . . . in his discretion parole into the United States . . . any alien"); see also Samirah v. O'Connell, 335 F.3d 545, 547-48 (7th Cir. 2003), cert. denied, 541 U.S. 1085, 124 S. Ct. 2811 (2004) ("the Attorney General has the discretion to revoke advance parole after it has been granted"). Because Congress expressly specified that the authority to grant or revoke parole is within the discretion of the Attorney General judicial review of that decision is precluded. See 8 U.S.C. § 1226(c) (barring review of the "grant, revocation, or denial of . . . parole"); 8 U.S.C. § 1252(a)(2)(B) (barring review of decisions committed to the discretion of the Attorney General); Samirah, 353 F.3d at 549 (holding that the decision to grant or revoke parole is "squarely within the ambit of § 1252(a)(2)(B)(ii), . . . [and a] district court lack[s] jurisdiction to review, much less reverse, the revocation of . . . parole"). Therefore, according to 8 U.S.C. § 1252(a)(2)(B), we have no jurisdiction to review the revocation of plaintiff's advance parole.

IV

Based on the foregoing, we conclude that we lack jurisdiction to consider the issues presented in plaintiff's amended complaint. Therefore, **IT IS ORDERED GRANTING** defendants' motion to dismiss (doc. 27). **IT IS FURTHER ORDERED GRANTING** defendants' motion for leave to file a late reply (doc. 30).

DATED this 30th day of October, 2006.

/s/Frederick J. Martone
Frederick J. Martone
United States District Judge

APPENDIX C

CONSTITUTION

5th Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

STATUTES

5 U.S.C. 702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein

(1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or

(2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought

8 U.S.C. 1182(a)(7)

Documentation requirements

(A) Immigrants

(i) In general Except as otherwise specifically provided in this chapter, any immigrant at the time of application for admission—

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 1181 (a) of this title, or

(II) whose visa has been issued without compliance with the provisions of section 1153 of this title,

is inadmissible.

(ii) Waiver authorized For provision authorizing waiver of clause (i), see subsection (k) of this section.

(B) Nonimmigrants

(i) In general Any nonimmigrant who—

(I) is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period, or

(II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission,

is inadmissible.

(ii) General waiver authorized For provision authorizing waiver of clause (i), see subsection (d)(4) of this section.

(iii) Guam and Northern Mariana Islands visa waiver For provision authorizing waiver of clause (i) in the case of visitors to Guam or the Commonwealth of the Northern Mariana Islands, see subsection (l).

(iv) Visa waiver program For authority to waive the requirement of clause (i) under a program, see section 1187 of this title.

8 U.S.C. 1182(d)(5)(A)

The Attorney General may, except as provided in subparagraph (B) or in section 1184 (f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe

only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

8 U.S.C. 1225(b)(1)(A)(i)

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

8 U.S.C. 1225(b)(2)(A)

(A) Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

(B) Exception

Subparagraph (A) shall not apply to an alien--

(i) who is a crewman,

(ii) to whom paragraph (1) applies, or

(iii) who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory.--In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 240.

8 U.S.C. 1229a

Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182 (a) of this title or any applicable ground of deportability under section 1227 (a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

8 U.S.C. 1255(a)

Status as person admitted for permanent residence on application and eligibility for immigrant visa. The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

28 U.S.C. 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1361

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

APPENDIX E

REGULATIONS

8 C.F.R. 1.1(q)

The term arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) of the Act, and even after any such parole is terminated or revoked. However, an arriving alien who was paroled into the United States before April 1, 1997, or who was paroled into the United States on or after April 1, 1997, pursuant to a grant of advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, will not be treated, solely by reason of that grant of parole, as an arriving alien under section 235(b)(1)(A)(i) of the Act.

8 C.F.R. 212.5(e)

Termination of parole--

(1) Automatic. Parole shall be automatically terminated without written notice

(i) upon the departure from the United States of the alien, or,

(ii) if not departed, at the expiration of the time for which parole was authorized, and in the latter case the alien shall be processed in accordance with paragraph (e)(2) of this section except that no written notice shall be required.

(2)

(i) On notice. In cases not covered by paragraph (e)(1) of this section, upon accomplishment of the purpose for which parole was authorized or when in the opinion of one of the officials listed in paragraph (a) of this section, neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he or she shall be restored to the status that he or she had at the time of parole. When a charging document is served on the alien, the charging document will constitute written notice of termination of parole, unless otherwise specified. Any further inspection or hearing shall be conducted under section 235 or 240 of the Act and this chapter, or any order of exclusion, deportation, or removal previously entered shall be executed. If the exclusion, deportation, or removal order cannot be executed within a reasonable time, the alien shall again be released on parole unless in the opinion of the official listed in paragraph (a) of this section the public interest requires that the alien be continued in custody.

(ii) An alien who is granted parole into the United States after enactment of the Immigration Reform and Control Act of 1986 for other than the specific purpose of applying for adjustment of status under section 245A of the Act shall not be permitted to avail him or herself of the privilege of adjustment thereunder. Failure to abide by this provision through making such an application will subject the alien to termination of parole status and institution of proceedings under sections 235 and 236 of the Act without the written notice of termination required by §212.5(e)(2)(i) of this chapter.

(iii) Any alien granted parole into the United States so that he or she may transit through the United States in the course of removal from Canada shall have his or her parole status terminated upon notice, as specified in 8 CFR 212.5(e)(2)(i), if he or she makes known to an immigration officer of the United States a fear of persecution or an intention to apply for asylum. Upon termination of parole, any such alien shall be regarded as an arriving alien, and processed accordingly by the Department of Homeland Security.

8 C.F.R. 212.5(f)

Advance authorization. When parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued Form I-512.

8 C.F.R. 235.1(h)(2)

Paroled aliens. Any alien paroled into the United States under section 212(d)(5) of the Act, including any alien crewmember, shall be issued a completely executed Form I-94, endorsed with the parole stamp.

8 C.F.R. 245.2(a)(4)(ii)(B)

The travel outside of the United States by an applicant for adjustment who is not under exclusion, deportation, or removal proceedings shall not be deemed an abandonment of the application if he or she was previously granted advance parole by the Service for such absences, and was inspected and paroled upon returning to the United States. If the adjustment of status application of such individual is subsequently denied, he or she will be treated as an applicant for admission, and subject to the provisions of section 212 and 235 of the Act.

8 C.F.R. 245.2(a)(5)(ii)

Under section 245 of the Act. If the application is approved, the applicant's permanent residence shall be recorded as of the date of the order approving the adjustment of status. An application for adjustment of status, as a preference alien, shall not be approved until an immigrant visa number has been allocated by the Department of State, except when the applicant has established eligibility for the benefits of Public Law 101-238. No appeal lies from the denial of an application by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 CFR part 240. Also, an applicant who is a parolee and meets the two

conditions described in §245.2(a)(1) may renew a denied application in proceedings under 8 CFR part 240 to determine admissibility. At the time of renewal of the application, an applicant does not need to meet the statutory requirement of section 245(c) of the Act, or §245.1(g), if, in fact, those requirements were met at the time the renewed application was initially filed with the director. Nothing in this section shall entitle an alien to proceedings under section 240 of the Act who is not otherwise so entitled.

8 C.F.R. 1245.2(a)(1)(ii)

Arriving Aliens. In the case of an arriving alien who is placed in removal proceedings, the immigration judge does not have jurisdiction to adjudicate any application for adjustment of status filed by the arriving alien unless:

(A) The alien properly filed the application for adjustment of status with USCIS while the arriving alien was in the United States;

(B) The alien departed from and returned to the United States pursuant to the terms of a grant of advance parole to pursue the previously filed application for adjustment of status;

(C) The application for adjustment of status was denied by USCIS; and

(D) DHS placed the arriving alien in removal proceedings either upon the arriving alien's return to the United States pursuant to the

grant of advance parole or after USCIS denied the application.